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No. 543

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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GORDON L. HARMSEN,
*Petitioner and Appellee, below,*

vs.

DEANE FIZZELL, THEO FIZZELL, WILLIAM JOHNSTON and DONNA JOHNSTON,
*Respondents and Appellants below.*

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## PETITION FOR REHEARING

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## PETITION FOR REHEARING

TO: The Honorable Chief Justice and the Justices of the Supreme Court of the United States:

In the interest of justice guaranteed under the Constitutions of the United States and the State of Michigan, this Petition for Re-Hearing is submitted, and in the belief that the inalienable rights of a citizen of the United States and an honorably discharged soldier will not be denied without full and complete consideration by the highest court of the land and an opportunity to be heard, the following additional factual data and cogent reasons are urged as a last resort to obtain justice and equity in behalf of Petitioner who, since he was released from the Kalamazoo State Hospital and restored to competency by the Probate Court for Berrien County, after hearing competent medical testimony, almost four years ago, has been assiduously endeavoring to recover possession and control of his two minor children:

1. More than two and one-half years have elapsed since the Circuit Court for Berrien County considered the matter of jurisdiction and fitness of Petitioner, and ordered custody of said Petitioner's two minor children in him, after considering all facts in the case.

2. Although the Circuit Court, being a court of competent jurisdiction in the matter and a superior court to the Probate Court for Berrien County, ordered the said children forthwith restored to Petitioner, their natural father, in July, 1956, not until December 24, 1957, was the Circuit Judge sustained by an opinion and Order of the Supreme Court of Michigan, but this failed to settle the case, for subsequent to a change in Supreme Court personnel a rehearing was granted these stranger respondents and the Supreme Court subsequently reversed its prior order, contrary to the law of the State of Michigan for settled cases.

3. Although Petitioner is cognizant of the federal policy of exhausting all state remedies before hearing appeals and he is, likewise, aware of a reversal and remand order in this habeas corpus proceeding, it is respectfully submitted that said Order merely results in opening the door for respondents to all manner of legal subterfuge to retain custody of these children, and by the time all of these had been exhausted in this state, the children in question could long since have obtained their majority; that in this particular case the time element alone, made possible by the reversing Order, is sufficient to defeat Petitioner's constitutional rights; and that he, being of modest financial resources, can be subjected to a multiplicity of suits and endless expense by parties without privity, to obtain custody of his own children.

4. Petitioner again respectfully invites the Court's attention to the fact that the Probate Court for Berrien County and said Petitioner are the real parties involved in this controversy, and the Probate Court never saw fit to appeal the decision of the Circuit Court; that respondents in appealing to the Michigan Supreme Court, were seeking relief for the Probate Court below where the latter was not before the Supreme Court complaining thereof.

5. Respondents are mere stakeholders who were liable only to turn over the children as ordered by the Court, and lacked interest in the subject matter or controversy

sufficient to support an appeal and subsequent Petition for Re-Hearing.

6. Respondents had insufficient interest in the subject matter to challenge the conclusion and findings of the trial judge.

7. Respondents were not aggrieved in legal acceptation by the orders of the trial judge because they did not operate prejudicially and directly upon their property or pecuniary rights or interest.

> Supreme Court need not consider findings and conclusions of trial judge given as reasons for decree where they are challenged by no one having interest in the subject matter.
>
> *Webbert vs. Township of Park*, 261 Mich. 454.

> "One desiring to appeal must have an interest in the subject matter of the litigation * * *. A party is aggrieved by a judgment or decree, so as to be entitled to appeal where the judgment or decree operates on his rights in property or bears directly on his interest * * *."
>
> *In re Trankla's Estate*, 321 Mich. 478.

> "For one to be aggrieved, so that he is entitled to appeal, he must have some interest of a pecuniary nature in the outcome of the case and not merely a possibility arising from some unknown and future contingency."
>
> *In re Trankla's Estate*, 321 Mich. 478.

> "A mere stakeholder who is liable only to turn over money or property as ordered by the court lacks interest in the subject matter or controversy sufficient to support an appeal from a decision relative to the distribution thereof."
>
> *C. J. S.*, Title Appeal and Error 177.

To sum this unfortunate matter up in its entirety, it may be succinctly stated that children are being torn from the

side of their natural guardian and father by complete strangers without one scintilla of authority, and two of respondents are receiving financial assistance from the county. The question of adoption does not enter the picture, respondents being fully aware that they have never adopted said children. If this case is allowed to go unchallenged by our highest tribunal it simply means that a person incarcerated in a mental institution for two years is to be penalized permanently in these United States for a condition over which he had no control, and further, it will enable any party to obtain and retain another's children by reason of possession alone.

The issues raised in this Petition for Rehearing have been stoutly asserted ab initio.

As stated in detail in our basic Petition for Writ of Certiorari, as well as in this Petition for Re-hearing, Petitioner has been denied rights guaranteed him under the Constitutions of the State of Michigan and United States, and it is earnestly prayed that this Honorable Court correct this grave injustice which has been perpetrated on Petitioner by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

A. H. Lee,
*Counsel for Petitioner.*
Business Address:
785 Pipestone Street,
Benton Harbor, Michigan.

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## CERTIFICATE OF COUNSEL

I, A. H. Lee, Attorney for Petitioner, hereby certify that this Petition is presented in good faith and not for delay.

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A. H. Lee